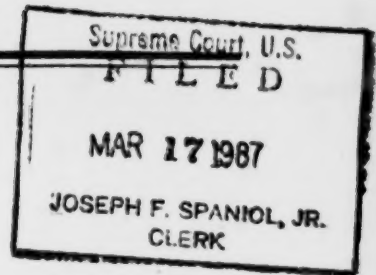


86 1631 ①



No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DR. MILTON MARGOLES,

Petitioner,

vs.

ALIDA JOHNS and THE JOURNAL COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Perry Lee Margoles
312 Holdridge Avenue
Winthrop Harbor, Illinois 60096
(312) 746-1971

Attorney for Petitioner

QUESTIONS PRESENTED FOR REVIEW:

1. Has the Seventh Circuit violated Petitioner's First Amendment rights to petition the government for a redress of grievances and to free speech, by imposing a substantial penalty against him where, in good faith, he presented to that court an appeal raising issues of judicial impropriety?

2. Should the Court extend its decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.* (393 U.S. 145 [1968]) and require that at the outset of any federal court case, the judge, counsel, and all parties be required to disclose any circumstances which reasonably could require the disqualification of the judge?

3. Should the "possible temptation" prohibition which the Court has identified in a line of cases as requiring *per se* judicial disqualification to comply with the Due Process

Clause of the Fourteenth Amendment, apply where the presiding judge/his office, prior to his ascension to the bench, "maintained communication" with Respondents' attorneys concerning this same case to which he then was assigned upon becoming a judge?¹

¹ See, e.g., *Marshall v. Jerrico, Inc.*, 46 U.S. 238, 242-243 (1980); and most recently, *Aetna Life Insurance Co. v. Lavoie*, ___ U.S. ___, 89 L.Ed. 2d 823, 833, 835 (1986).

Subsidiary Questions Involving Related Issues: Should the Court deem the questions above as worthy of granting a Writ of Certiorari, Petitioner suggests several related subsidiary questions:

4. Did the above-described extrajudicial "maintained communication" relationship between the presiding judge/his former office and Respondents' attorneys also deny Petitioner his Constitutional right to an impartial judge by violating the *per se* "of counsel" prohibition of the pre-1974 version of 28 U.S.C. § 455 (which has been held applicable to this case)? And,

5. (With respect to adjudication of the present R. 60 [b] [6] motion) Was Petitioner denied his right to an impartial judge where the District Court based its refusal of his recusal request, not on consideration of the reasons set forth in the request, but on its assessment of the merits of the R. 60 (b) (6) motion?

TABLE OF CONTENTS

	Page
Questions Presented.....	1
Table of Authorities.....	iv
Opinions Below.....	1
Jurisdiction.....	1
Statutory Provisions Involved.....	2
Statement of the Case.....	2
The Factual Background.....	2
The Proceedings in the Courts Below.....	6
Reasons for Granting the Writ.....	15
Conclusion.....	30
Appendix A: Opinions, orders, and judgments of the Court of Appeals and the District	
Appendix B: Constitutional and Statutory Provisions	

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Aetna Life Insurance Co. v. Lavoie</i> , ___ U.S. ___, 89 L. Ed. 2d 823 (1986)...	ii, 26
<i>Barry v. U.S.</i> , 528 F.2d 1094, 7th Cir. (1976).....	7
<i>Commonwealth Coatings Corp. v.</i> <i>Continental Casualty Co.</i> , 393 U.S. 145 (1968).....	20-23
<i>De Jonge v. Oregon</i> , 299 U.S. 353 (1937).....	19
<i>Freeman v. Chicago Musical Instrument</i> <i>Co.</i> , 689 F.2d 715, 7th Cir. (1982).....	13
<i>Hampton v. Hanrahan</i> , 449 F.Supp. 640, N.D.Ill.E.D. (1980).....	13
<i>Margoles v. Johns</i> , 587 F.2d 885, 7th Cir. (1978).....	8
<i>Margoles v. Johns</i> , 660 F.2d 291, 7th Cir.(1981).....	10, 12
<i>Margoles v. Johns</i> , 798 F.2d 1069, 7th Cir. (1986).....	1
<i>Marshall v. Jerrico, Inc.</i> , 446 U.S. 238 (1980).....	ii
<i>McDonald v. Smith</i> , ___ U.S. ___, 86 L.Ed. 2d 384 (1985).....	19
<i>Merit Insurance Co. v. Leatherby</i> <i>Insurance Co.</i> , 714 F.2d 673, 7th Cir. (1983).....	21
<i>Mine Workers v. Illinois Bar</i> <i>Association</i> , 389 U.S. 217 (1967).....	19

<i>In Re Murchison</i> , 349 U.S. 133 (1955).....	26
<i>New York Times Co. v. Sullivan</i> , 376 U.S. 254 (1964).....	20
<i>SCA Services, Inc. v. Morgan</i> , 447 F.2d 110, 7th Cir. (1977).....	7
<i>Steinle v. Warren</i> , 765 F.2d 95, 7th Cir. (1985).....	14
<i>U.S. v. Amerine</i> , 411 F.2d 1130, 6th Cir. (1969).....	28
<i>U.S. v. I.B.M.</i> , 618 F.2d 923, 2d. Cir. (1980).....	29
<i>U.S. v. Murphy</i> , 768 F.2d 1518, 7th Cir. (1985).....	20-21
<i>U.S. v. Rovetuso</i> , 768 F.2d 809, 7th Cir. (1985).....	21
<i>In Re Wisconsin Steel Corp.</i> , 48 B.R. 753, N.D.Ill.E.D. (1985).....	21
<i>Withrow v. Larkin</i> , 421 U.S. 35 (1975)...	26

LAW REVIEW ARTICLES

86 <i>Harvard Law Review</i> , 736 (1973), "Disqualification of Judges and Justices in the Federal Courts".....	29
71 <i>Michigan Law Review</i> , 538 (1973), "Disqualification For Interest of Lower Federal Court Judges: 28 U.S.C. § 455".....	29

OTHER AUTHORITIES

Page

72 ALR 2d, "Disqualification of Judge,"
§ 7 -- "Consultation as Representation"..29

115 Congressional Record No. 26
(February 7, 1969)..... 3

118 Congressional Record No. 47
(March 27, 1972)..... 3

119 Congressional Record No. 23
(February 8, 1973)..... 3

119 Congressional Record No. 26
(February 20, 1973)..... 3

Warden, Rob, "Hearing Sought
on Webb-Kocoras Relationship,"
Chicago Lawyer (September, 1985).....21

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Petitioner seeks a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

Both opinions below are attached hereto in Appendix A. The January 17, 1985, decision and order of the District Court for the Eastern District of Wisconsin are unreported. The August 20, 1986, opinion of the United States Court of Appeals for the Seventh Circuit is reported at 798 F.2d 1069.

JURISDICTION

Petitioner timely filed a petition for rehearing with the Court of Appeals (on September 24, 1986, pursuant to an extension granted by that Court on September 3, 1986), which was denied on November 17, 1986.

Petitioner was granted an extension of time to and including March 17, 1987, in which

to file a Petition for a Writ of Certiorari (by an order signed by Justice Stevens on February 9, 1987)).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

- the 1st Amendment to the United States Constitution;
- the 14th Amendment to the United States Constitution.
- 28 U.S.C. § 144;
- 28 U.S.C. § 455 (prior to 1974 amendment); and
- Fed.R.Civ.P. 60 (b);

These provisions are attached hereto in Appendix B.

STATEMENT OF THE CASE

THE FACTUAL BACKGROUND

This is one of two diversity defamation actions filed by Petitioner between the time he was convicted of several offenses arising out of a 1960 tax case, and when he received a Presidential Pardon for those offenses in 1972. In the interim, he became the subject of increasing attention in the (midwest) regional

and national press and in Congress concerning whether he was being treated unjustly.²

One aspect of the public controversy was whether Wisconsin medical board officials and particularly their counsel, an assistant to then-Wisconsin Attorney General Robert W. Warren, were violating the Civil Rights of Petitioner, a physician, by interfering with his obtaining licensure and practicing in other states (e.g., Illinois) by disseminating false information (e.g., that he had performed illegal abortions). (present R. 60 [b] [6] motion, par. #8)

In the face of mounting press and Congressional criticism, Warren in his supervisory position as Attorney General (1969-1974) repeatedly became personally involved and was kept informed regarding the matters in

²E.g., 115 *Congressional Record* No. 26, H877 (February 7, 1969); 118 *Congressional Record* No. 47, E3117 (March 27, 1972); 119 *Congressional Record* No. 23, E757 (February 8, 1973); 119 *Congressional Record* No. 26, E902 (February 20, 1973)

which his office was opposing Petitioner.³ In 1970, Petitioner filed the first defamation (and Civil Rights) lawsuit against Warren's assistant and medical board officials. Warren was defense counsel of record in the case until he became a Federal District Judge in 1974.

Shortly after the first defamation action had been filed, Alida Johns, then a reporter for the *Milwaukee Sentinel*, allegedly initiated a series of defamatory telephone calls to public officials about Petitioner--from which this second defamation lawsuit arose (and was filed in 1972). According to various witnesses,

³E.g., Warren met with his assistants to be personally aware of "all aspects" of the Margoles matters and to discuss strategy about them (Pl. Exh. #23, 40), approved and signed correspondence about Petitioner (e.g., Pl. Exh. #21), and was sent a flow of memoranda and materials about Petitioner in accordance with his assistant's promise to keep Warren informed of "any further developments." (E.g., Pl. Exh. #20, 22-24, 31, 40) These occurred with Warren's efforts to head off an investigation by the Civil Rights Division of the U.S. Justice Dept. (1969-1970) and in Warren's role as counsel in state court, opposing medical license reinstatement for Petitioner (1969-1970; R. 60 [b] [6] motion, par. #9-10).

Respondent Johns--upon learning that the Illinois medical board had approved Petitioner's application--contacted them and sought to have that decision reversed and support on his behalf for a Presidential Pardon withdrawn. Among other slurs, she, too, allegedly accused Petitioner of having performed illegal abortions. (R. 60 [b] [6] motion, par. #11; e.g., Pl. Exh. #1, 3-8)

Because, to all appearances to Petitioner, this was but a continuation where the smear campaign emanating from Atty. Gen. Warren's office had left off, Petitioner repeatedly attempted to establish a connection between them through pre-trial discovery in both slander lawsuits. However, any such substantive communications were denied by the defendants in both cases. (R. 60 [b] [6] motion, paragraph #12)

THE PROCEEDINGS IN THE COURTS BELOW

Original Proceedings: In 1974, Petitioner moved for the Hon. John W. Reynolds to disqualify himself from this case because as a former Wisconsin Attorney General he had counselled action against Petitioner's medical license after the 1960 tax conviction. While that motion was pending, Atty. Gen. Warren was nominated to the federal bench, and within the course of a two-week period in October, 1974, Warren was transformed from opposing counsel in Petitioner's first defamation case (in the Western District of Wisconsin) to presiding judge in this, Petitioner's second defamation case--which was reassigned to Warren upon donning his judicial robe in the Eastern District of Wisconsin.

Because the explicit provisions of 28 U.S.C. § 144 and uniform case law construction at that time of § 144 barred Petitioner from moving for the disqualification of a second judge in the same case, at Judge Warren's first

appearance in this case on April 25, 1975, Petitioner expressed his concern to Judge Warren about Warren's partiality because of his previous adversarial positions as Attorney General against Petitioner.

Judge Warren summarily disclaimed any bias and did not disqualify himself. Petitioner did not appeal the issue, because at that time the Seventh Circuit did not allow writs of mandamus or prohibition for judicial disqualification (see *SCA Services, Inc. v. Morgan*, 447 F.2d 110, 117, 7th Cir. [1977]), or for the issue (formally) to be raised for the first time on appeal. (*Barry v. U.S.*, 528 F.2d 1094, 1100, 7th Cir. [1976])

On Jan. 8, 1976, six weeks after Petitioner fully (although two months tardily because of serious illness and extraordinary personal difficulties) had complied with a discovery order, Judge Warren nonetheless granted Respondents' motion to dismiss this case upon finding that Petitioner wilfully had

disobeyed his order. This became the first reported federal case to allow dismissal under Fed.R.Civ.P. 37 (B) (2) (C) notwithstanding full prior compliance, in the absence of any prior warning of possible sanctions by the court, and where the delay was due to personal illness and hardship rather than refusal to comply. Judge Warren denied Petitioner's R. 60 (b) motion to reconsider. On the basis of the record presented to it, the Seventh Circuit affirmed Judge Warren in what it found to be a close case in which it was not allowed to substitute its discretion for Judge Warren's. (*Margoles v. Johns*, 587 F.2d 885, 888-889, 7th Cir. [1978]; cert. denied, 420 U.S. 946 [1977])

Second Set of Proceedings: In 1979, as the first defamation case was about to go to trial, the Attorney General's office produced some additional documents which established that -- contrary to its previous representations--in fact, there had been substantive communications regarding Petitioner

between that office and the Respondent newspaper company, and that a secret investigative file (designated "DCI 22-7") on Petitioner existed in the office. However, the Attorney General's office successfully barred Petitioner from seeing the rest of those files. (R. 60 [b] [6] motion, par. #18-19)

Consequently, in 1980 Petitioner brought a second, R. 60 (b) (4) motion, seeking to have Judge Warren's judgment of dismissal declared void because of the *appearance of partiality* (under Canon 3 [C] of the Code of Judicial Conduct) resulting from Warren's previous roles as Attorney General opposing Petitioner in the *other litigation*. Petitioner requested an evidentiary hearing so that all of the facts and ramifications could be learned about the emerging evidence of apparent communications regarding Petitioner between Warren's office as Attorney General and the Respondent newspaper company, and about the extent of Judge Warren's knowledge and involvement in those matters.

Respondents' counsel vigorously opposed the granting of the hearing as well as the motion. The Hon. Terence T. Evans, to whom the motion was assigned, denied both the hearing and the motion in a decision which avoided any mention of the specific documents and threshold facts Petitioner had submitted as to Atty. Gen. Warren's extensive personal contacts with the cases in his office relating to Petitioner. The Seventh Circuit adopted Judge Evans' decision as its own, including the first reported holding by any federal court that "a litigant is not denied due process by... 'the appearance' of partiality..." (*Margoles v. Johns*, 660 F.2d 291, 296, 7th Cir. [1981]; cert. denied 455 U.S. 909 1982))

Present Proceedings: Most recently, Petitioner attempted in 1983 under Wisconsin's newly enacted Open Records Law (Chapter 335, Laws of 1981) to see the files on him in the Attorney General's office to which he still was being denied access. Pursuant to this request,

that office for the first time made available to him *parts* of files on him, of whose contents he had no prior knowledge. These included:

1. Memoranda and correspondence revealing that for *several years* while Warren was Attorney General immediately prior to becoming the judge in this case-- Warren's office had "MAINTAINED COMMUNICATION" WITH RESPONDENTS' ATTORNEYS CONCERNING THIS CASE both to enable Warren's office to better defend itself against Petitioner in the other defamation case and to assist Respondents' attorneys in this very case from which Warren thereafter would not recuse himself; (Pl. Exh. #B-1)

2. Portions of the "DCI 22-7" file, including transcripts of recorded telephone conversations, disclosing that by the time Warren became Attorney General, his office already had used another, veteran reporter for the Respondent newspaper company to investigate Petitioner to obtain information for use against him in other proceedings. (Pl. Exh. #B-8-9) While the reporter at that time (1965) was not on the newspaper company's payroll, subsequently the Attorney General's office again sought the reporter's assistance for information for use against Petitioner--and this occurred after the election in 1968 of Warren as Attorney General and when the reporter again was an employee of that company. Thus, the newly produced "DCI 22-7" transcripts raised the issue whether Judge Warren had presided over a defamation lawsuit notwithstanding that his previous office had been utilizing the defendant newspaper company to investigate and help discredit plaintiff.

However, the Attorney General's office would not produce the rest of these files bearing on the extent of these activities and

Atty. Gen. Warren's personal involvement and/or knowledge regarding them. (It asserted lawyer-client privilege as to the former; R. 60 [b] [6] motion, par. #22-26)

On the basis of these newly discovered documents, Petitioner in 1984 filed the present R. 60 (b) (6) motion, asking that the proceedings in this case over which Judge Warren presided be nullified because of the *actual prejudice* caused to Petitioner and the judicial process by:

1. The repeated failures throughout the two previous sets of proceedings in this case--especially with Petitioner twice having raised the disqualification issue--of Judge Warren/his former office as Attorney General and Respondents/their attorneys to disclose the existence of these extrajudicial relationships; and

2. The *per se* disqualification of Judge Warren from this case because these extrajudicial activities respectively violated the "of counsel" and "substantial interest" prohibitions of pre-1974 28 U.S.C. § 455 (which the Seventh Circuit has held applicable to this case [footnote #2 at A-4], and which it had found not at issue in the 1980 R. 60 [b] [4] motion; *Margoles v. Johns*, 660 F.2d at 299, 7th Cir. [1981]) as well as the "forbidden temptation" disqualification requirement of

this Court.⁴

Once again, Petitioner requested an evidentiary hearing so that all of the relevant facts and ramifications finally could be made known. And, Petitioner asked that this motion be assigned to an outside judge, because this motion accused Judge Warren (and Respondents' lawyer, James P. Brody) of ethical misconduct,

⁴Because the Wisconsin Attorney General's office would not produce its files bearing on the extent of Atty. Gen. Warren's personal involvement and knowledge regarding the newly disclosed extrajudicial relationships (e.g., Pl. Exh. #B-29, 35, 38-40), Petitioner submitted that the presumption should apply here that "particular individuals in a law firm freely share their client's confidences with one another"--the application of this presumption in a given case "turn[ing] on the possibility, or appearance thereof, that confidential information might have been given to the attorney in relation to the subject matter in which disqualification is sought." (*Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 722, 7th Cir. [1982]) That this presumption applies to judicial as well as lawyer disqualification, see *Hampton v. Hanrahan*, 499 F.Supp 640, 645, N.D.Ill.E.D. (1980). Its appropriateness to Judge Warren in this case, Petitioner submitted, is evident from the documented pattern of Atty. Gen. Warren's contacts, involvement, and knowledge regarding the other Margoless cases in his office.

not judicial error; and, further because simultaneously Atty. James P. Brody was counsel of record in the same Court, defending Judge Warren in an unrelated Civil Rights lawsuit. (*Steinle v. Warren*, in which Brody succeeded in winning dismissal for Judge Warren, 765 F.2d 95, 7th Cir. [1985])

And once again, Atty. Brody opposed not only the R. 60 (b) motion, but also Petitioner's receiving an evidentiary hearing.

For one year, the Hon. Terence T. Evans did not act on Petitioner's repeated requests for recusal, his R. 60 (b) (6) motion, his request for a hearing, and would not acknowledge any of his correspondence. Finally, Petitioner filed a petition for a writ of mandamus with the U.S. Court of Appeals for the Seventh Circuit, seeking the assignment of an outside judge. Before that Court acted on the petition, Judge Evans ruled that he would not recuse himself because the R. 60 (b) (6) motion "must so obviously be denied" (A-16),

and denied the motion as insufficient and precluded by *res judicata*. (A-15-16) Thereupon, the Court of Appeals dismissed the petition as moot.

The Seventh Circuit held Petitioner's appeal from Judge Evans' decision to be "frivolous" and assessed him \$2,500 in damages, fees, and costs. It denied his petition for rehearing.

REASONS FOR GRANTING THE WRIT

1. THE FIRST AMENDMENT RIGHTS "TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES" AND TO FREE SPEECH INCLUDE GOOD FAITH CRITICISM OF FEDERAL JUDICIAL IMPROPRIETY, AND ARE TO BE EXERCISED WITHOUT RETRIBUTION BY THE COURTS.

Petitioner, after presenting to the lower courts the newly discovered facts and the issues they raise as to the improprieties relating to the Hon. Robert W. Warren not recusing himself from this case, now feels like the little child in Hans Christian Andersen's fable, "The Emperor's New Clothes." The lower courts here, like the crowds, the courtiers,

and the emperor himself in the fable, would not accept the truth coming before their eyes.

The fable does not say whether any harm befell the child for risking the wrath of the emperor by speaking the truth. But in this case, the Seventh Circuit has demonstrated its displeasure. Instead of addressing the compelling issues of violations of judicial ethics and Due Process rights actually raised in Petitioner's appeal, that Court has punished Petitioner for raising these issues.

Petitioner is well aware that some parties and attorneys have brought frivolous appeals regarding judicial ethics, but this was not one of them. Sensitive to the responsibility and professionalism with which such serious matters should be presented, Petitioner set forth in specific detail the extraordinary facts, citations to corroborative exhibits, and a considerable body of case law and other authority supporting his issues and arguments.

In response, the Seventh Circuit *devoided*

Petitioner's appeal of its significance by variously omitting and fundamentally changing the primary issues, exhibits, and standards of review--so that the decision bears little resemblance to Petitioner's appeal actually briefed and argued to that Court.⁵ Thereupon,

⁵Petitioner has asked the District Court Clerk to include in the certified record available for this Court's review all of the briefs submitted to the Seventh Circuit in the appeal at issue (*Margoles v. Johns*, Case #85-1267). A comparison of the briefs and the Seventh Circuit's decision substantiates, e.g. that:

a. PL. EXH. #B-1--"MAINTAINED COMMUNICATION": Nowhere did the decision mention Petitioner's principal exhibit which prompted the present R. 60 (b) (6) motion (*supra*, p. 11; *infra*, pp. 26-30). Instead, the decision took but *one example* of the communications (Pl. Exh. #B-4, a cover letter with copies mostly of legal documents which were mailed to Respondents' counsel) and specifically analyzed only this secondary exhibit, out of context, as if it were the totality of the communications and the principal exhibit did not exist (A-9; see Pl. Br., pp i, 24-31; Pl. R. Br., pp. ii, 14-17);

b. "ACTUAL" PARTIALITY/PREJUDICE: The decision misstated the applicable criterion for disqualification: "The plaintiff maintains that the proper threshold of proof would be that of an appearance of partiality." (n.11, A-11) In fact, Petitioner's appeal emphasized that the newly disclosed extrajudicial

it imposed a substantial penalty of \$2,500 in damages, fees, and costs, upon Petitioner for

relationships come within multiple *per se* disqualification prohibitions, that the repeated failures to disclose these activities constituted *actual prejudice* and that the "appearance of partiality" was not involved in the appeal. (See Pl. Br., pp. 22-24; Pl. R. Br., pp. 4-5) By applying the wrong standard, the decision "*ipso facto*" precluded Petitioner from prevailing, because that Court previously had held that the "appearance of partiality ...cannot rise to the level of reversible error" (A-11-12); and

c. NON-DISCLOSURE ISSUE: The first and a key issue raised in Petitioner's brief was the actual prejudice caused by the repeated failures to disclose the newly discovered extrajudicial relationships. Relatedly, Petitioner asked the Seventh Circuit to address the prejudice caused by the continuing refusal of the Attorney General's office to allow him access to the rest of its files relating to these activities. (Pl. Br., pp. i, 3, 10-11, 13-22; Pl. R. Br., ii, 8, 12-14, 19; Pl. Supplemental Br., p. 2) Yet, nowhere did the Seventh Circuit substantively discuss this issue. Regarding Respondents/their attorneys, it said nothing. With respect to Judge Warren/his former office, it only briefly noted that Petitioner had claimed non-disclosure (A-5) and made "unsupported allegations" which, the Seventh Circuit suggested, the District Court "obviously found...inconsequential." (n.9, A-10; in fact, the District Court's decision did not mention the non-disclosure issue. Cf: Petitioner's R. 60 [b] [6] motion, par. #29).

bringing a "frivolous" appeal. (A-12)

The Seventh Circuit's decision brings to this Court significant and troublesome Constitutional questions, because it is both an entirely improper approach to appellate review of good faith allegations of judicial impropriety, and a gross violation of Petitioner's First Amendment rights of "petition" and free speech to raise such issues. Certiorari is warranted to vindicate Petitioner's First Amendment rights here, because:

"The right to petition is 'among the most precious of the liberties guaranteed by the Bill of Rights,' *Mine Workers v. Illinois Bar Association*, 389 U.S. 217, 222 (1967) ...and except in the most extreme circumstances citizens cannot be punished for exercising this right 'without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions,' *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937)." (*McDonald v. Smith*, ___ U.S. ___, 86 L.Ed. 2d 384, concurring opinion of Justice Brennan at 390 [1985])

To permit the Seventh Circuit's decision to stand would be to deny Petitioner the "substantial 'breathing space'" that the First Amendment requires to be extended to such good

faith expression, and "would intolerably chill 'would-be critics of official conduct ...from voicing their criticism.'" (Id. at 390, quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 272, 279 [1964])

2. TO PROTECT THE INTEGRITY OF THE JUDICIAL PROCESS AND CONSERVE JUDICIAL RESOURCES, THE COURT'S DISCLOSURE REQUIREMENTS FOR ARBITRATORS (COMMONWEALTH COATINGS CORP. V. CONTINENTAL CASUALTY CO. [393 U.S. 145, 1968]) SHOULD BE EXTENDED TO ALL FEDERAL COURT PROCEEDINGS.

This case is the latest in a recurring problem of "non-disclosure" cases which has arisen in recent years--particularly in the Seventh Circuit. In a variety of settings, disclosures have not been made of potentially disqualifying circumstances or relationships.⁶

⁶Examples of different "non-disclosure" situations within Seventh Circuit include:

-Two criminal prosecutions which the U.S. Attorney in Chicago personally tried before a U.S. District Judge. In one case, neither the prosecutor nor the judge disclosed that they were such close personal friends that they had planned a vacation together for after the trial--and when the defendant was convicted, his sentencing was advanced so that it would not interfere with their vacation. (*U.S. v.*

The practical problem now evident from such cases is that it is one thing for judicial disqualification standards to be enacted; it is another to assure that they are being followed.

Murphy, 768 F.2d 1518, 7th Cir. [1985]) In the other case, neither disclosed that they had returned from another joint vacation just a few days before that trial began. (*U.S. v. Rovetuso*, 768 F.2d 809, 7th Cir. [1985]; the decision did not specifically mention the "non-disclosure" issue raised in that appeal. The "non-disclosure" controversies in both cases were analyzed in "Hearing Sought on Webb-Kocoras Relationship," by Rob Warden in *Chicago Lawyer*, September, 1985. Both convictions were confirmed.);

-A \$10,000,000 arbitration award was set aside in Federal District Court (N.D.Ill.E.D.) after a party discovered that the neutral arbitrator had failed to disclose his previous employment by and under the supervision of the principal stockholder of the other party (reinstated by the Seventh Circuit in *Merit Insurance Co. v. Leatherby Insurance Co.*, 714 F.2d 673, 7th Cir. [1983]); and

-In a \$150,000,000 bankruptcy case, the Federal District Court (N.D.Ill.E.D.) expunged two key orders (which--defendants discovered--secretly had been written for the Chief Bankruptcy Judge by the debtor's law firm), disqualified both the Bankruptcy Judge and the law firm from the case, and imposed substantial monetary sanctions against the law firm. (*In Re Wisconsin Steel Corp.*, 48 B.R. 753, N.D.Ill. E.D. [1985])

This gap demonstrates the need for the adoption by this Court (through the exercise of its supervisory power) of a disqualification disclosure requirement applicable to all federal court proceedings. The espousal by the Court of such a rule--with the deterrence of appropriate sanctions--could reduce this problem and needless additional litigation and wastes of judicial resources generated by ensuing judicial challenges--along with the public taint to the judicial process attendant to some of these controversies.

The basis for this rule already is to be found in *Commonwealth Coatings Corp. v. Continental Casualty Co.* (393 U.S. 145 [1968]), in which the Court set forth disclosure requirements for federal arbitrators. To "establish...an atmosphere of frankness at the outset," the Court set forth "the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias." (*Id.*, Justice

White's concurring opinion at 306; majority opinion at 305)⁷ Although the Court in that case noted the differences between arbitrators and Article III judges, it looked to the Judicial Canons for guidance because the Court has construed the disclosure requirements for both to be based in the same ethical principle and premise. (*Id.*, at 305)

This case demonstrates the genuine need for, and provides the Court with an appropriate vehicle through which to extend its disclosure requirement stated in *Commonwealth Coatings*.

⁷Petitioner suggests that the proposed disclosure rule include the following components:

1. At the outset of any federal court proceeding, full disclosure must be made by the judge, counsel, and all parties of any circumstances which reasonably could require disqualification of the judge;

2. The obligation is a continuing one; and

3. Failure to timely make such disclosure may constitute actual prejudice to the other party(ies) and the judicial process, and may warrant nullification of proceedings and/or other appropriate sanctions.

Twice before--beginning with Judge Warren's first appearance in this case in 1975--Petitioner raised the disqualification issue. Neither time was Petitioner informed by Judge Warren or Respondents'/their attorneys of the newly disclosed extrajudicial relationships. Now, in the face of these discoveries leading Petitioner for the *third time* to raise the disqualification issue and seek full disclosure, the lower courts instead have sanctioned a judge not recusing himself from a case notwithstanding the existence of extrajudicial relationships which may have rendered his participation improper *per se*--and the party challenging the judge's impartiality still is effectively blocked from learning the full details and extent of these relationships and of the judge's involvement in them. As an added indignity, for raising these issues, the party is penalized \$2,500 to the Respondents who successfully opposed the hearing sought by the party on these issues.

These circumstances warrant Certiorari, because judicial impartiality is a cornerstone of equal Justice, and disclosure of such Due Process and ethical importance cannot be permitted to become a function of choice or chance, or of a strategy of "one-upmanship." Petitioner asks the Court not to allow to stand the dangerous precedent here of judicial impartiality becoming a function of "catch-as-catch-can." No party should have to run this type of obstacle course so that it might uncover or pry loose pertinent facts determining whether a presiding judge is ineligible to hear its case.

3. THE COURT'S "FORBIDDEN TEMPTATION" DUE PROCESS STANDARD FOR JUDICIAL DISQUALIFICATION AND (PRE-1974) 28 U.S.C. § 455 REQUIRE NULLIFICATION OF THE PROCEEDINGS IN THIS CASE OVER WHICH JUDGE WARREN PRESIDED, BECAUSE WARREN/HIS PREVIOUS OFFICE AS WISCONSIN ATTORNEY GENERAL HAD "MAINTAINED COMMUNICATION" WITH RESPONDENTS' ATTORNEYS CONCERNING THIS SAME CASE IN WHICH WARREN THEREAFTER BECAME JUDGE AND FROM WHICH HE WOULD NOT RECUSE HIMSELF.

This case also warrants Certiorari because it presents to the Court an extraordinary

extrajudicial relationship so inimical to the essence of "Equal Justice Under Law" that it comes within the special category of situations to which the Court has applied its *per se* "forbidden temptation" prohibition.

These circumstances, the Court has found, "cannot be defined with precision" (*In Re Murchison*, 349 U.S. 133, 136 [1955]) and must be addressed on a case-by-case basis where,

"...various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." (*Withrow v. Larkin*, 421 U.S. 35, 47 [1975] Consequently, no actual bias need be present or proved--disqualification and reversal follow a determination that the "situation is one 'which would offer a possible temptation to the average...judge to...lead him not to hold the balance nice, clear and true.'" *Aetna Life Insurance Co. v. Lavoie*, *op. cit.*, ___ U.S. ___, 89 L. Ed. 2d 823, 833, 835 [1986], citing earlier authority.)

Two key words bring the newly discovered internal memorandum within the "forbidden temptation" prohibition--"MAINTAINED COMMUNICATION." (Pl. Exh. #B-1; R. 60 [b] [6] motion, par. #23)

"Communicated" or "exchanged information" (A-8-10) may be one-time and without Constitutional implications, but "**maintained**" (which appears *nowhere* in the Seventh Circuit's decision) means that the communications between Warren's office as Attorney General and Respondents' attorneys were *ongoing*.⁸ Indeed, the communications were mentioned in describing an assistant's activities regarding Petitioner *spanning several years*.

What especially renders these extra-judicial communications so Constitutionally repugnant is that they did not occur in the course of Judge Warren's "neutral" judicial

⁸The memo speaks of the activities of another of Atty. Gen. Warren's assistants and does not indicate whether Warren was personally involved or kept informed of these communications. However, as noted above, Petitioner is entitled to an affirmative presumption in this regard (1) because that office asserts lawyer-client privilege against producing the rest of its "trial" file bearing on this issue, and (2) because other documents produced by that office establish the pattern that Warren in his supervisory role repeatedly was *personally* involved and being kept informed concerning the other Margoless cases in his office. (See p. 3-4 and n.3, p. 3-4, *supra*.)

capacity--but adversariously against Petitioner. Atty. Gen. Warren/his office and Respondents' attorneys both were preparing their defense in their respective defamation cases against the *same* Plaintiff and claims of the *same* type of defamation. (*supra*, pp. 3-5; by omitting these specifics from its decision, the Seventh Circuit further obfuscated the Due Process issues actually presented to it.)

*The collaboration among attorneys here which was partisan trial preparation--involving no breach of legal ethics--became a manifest violation of Due Process when one of those lawyers became the judge in the very case in which he/his assistant(s) had "maintained communication" with and provided information to assist counsel for one side!*⁹

⁹This consultative role also requires nullification of Judge Warren's judgment of dismissal under the "of counsel" prohibition of (pre-1974) 28 U.S.C. § 455, which is "unconditional and absolute." (*U.S. v. Amerine*, 411 F.2d 1130, 1134, 6th Cir. [1969]) A broad body of authority recognizes mandatory "of counsel" disqualification where a judge had been "consulted in preparation for the case."

This extrajudicial relationship of "maintained communication" so flagrantly contravenes the principle of neutrality of the federal courts and the judicial process, as to call for an exercise of the Court's supervisory power. For this type of situation to be

("Disqualification of Judges and Justices in the Federal Courts," 86 *Harvard Law Review* 736, 760 [1973]; e.g., "Disqualification For Interest of Lower Federal Court Judges: 28 U.S.C. § 455," 71 *Michigan Law Review* 538, 551 [1973]; and 72 *ALR2d* at 462, "Disqualification of Judge," § 7 -- "Consultation as Representation")

That these serious allegations of impropriety against Judge Warren and Atty. Brody arose at the same time that Atty. Brody was defense counsel for Judge Warren in the same court in an unrelated Civil Rights lawsuit, Petitioner submitted, warranted the assignment of an outside judge to this R. 60 (b) (6) motion. (*supra*, p. 14) Judge Evans refused this request because of his opinion that the R. 60 (b) motion "must so obviously be denied." (A-16) Notwithstanding that the Seventh Circuit simply dismissed this issue as being "completely without merit" (n.3, A-5), Judge Evans applied a methodology for assessing disqualification, which is wholly alien to Constitutional requirements for judicial impartiality. Disqualification cannot depend on a judge's assessment of the merits of a proceeding, because a judge who lacks legal capacity to hear a case, by law, is incapable of rendering any such determination. (*U.S. v. I.B.M.*, 618 F.2d 923, 926, 2d Cir. [1980])

sanctioned, as it has been by the lower courts, provides additional fodder for public cynicism that this is the way many courts operate, and that they are a "closed fraternity" beyond reproach.

CONCLUSION

For the reasons stated above, we respectfully submit that this is a case of such importance as to warrant the granting of a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

Perry Margoles
312 Holdridge Avenue
Winthrop Harbor, Ill. 60096
(312) 746-1971

Attorney for Petitioner

United States Court of Appeals For the Seventh Circuit

No. 85-1267

DR. MILTON MARGOLES,

Plaintiff-Appellant,

v.

ALIDA JOHNS and THE JOURNAL COMPANY, a Corporation,

Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Wisconsin.

No. 72 C 470—Terence T. Evans, Judge.

ARGUED OCTOBER 23, 1985—DECIDED AUGUST 20, 1986

Before CUDAHY, ESCHBACH, and POSNER, *Circuit Judges.*

PER CURIAM. The plaintiff, Dr. Milton Margoles, brought this slander action in 1972 against The Journal Corporation, and Alida Johns, a reporter for the Journal. The district court dismissed the action in 1976, pursuant to Fed. R. Civ. P. 37(b)(2)(C), because of the plaintiff's failure to comply with discovery orders. The plaintiff unsuccessfully challenged the dismissal on direct appeal and in a subsequent collateral attack pursuant to Fed. R. Civ. P. 60(b)(4). The plaintiff is once again before us, following the district court's denial of his motion to vacate the dismissal and reinstate the action pursuant to Fed. R. Civ. P. 60(b)(6). For the reasons stated below, we will affirm.

I

For many years prior to 1962, the plaintiff was a licensed physician in Wisconsin and a number of other states. In 1960, the plaintiff was convicted of several violations of the Internal Revenue Code and was sentenced to one-year imprisonment and ordered to pay \$15,000.00 in fines. Later that same year, he was convicted of attempting to influence an officer of the court and of attempting to obstruct justice, and was sentenced to five-years imprisonment and ordered to pay \$5,000.00 in fines. In 1961, the plaintiff was also convicted of communicating with a juror, and was sentenced to six-months imprisonment and fined \$1,000.00.

The plaintiff's license to practice medicine and surgery in Wisconsin was revoked on February 26, 1962. Licenses he held to practice medicine in other states were subsequently revoked as well. Upon his release from prison on parole in 1962, the plaintiff commenced a campaign to regain his Wisconsin medical license. However, both in 1965 and 1969, the Wisconsin State Board of Medical Examiners, following formal hearings, denied him relicensure.

On August 18, 1972, the plaintiff filed a complaint in the United States District Court for the Eastern Division of Wisconsin, alleging that Alida Johns, while a newspaper reporter for The Journal Company, slandered him during conversations with staff members of an Illinois congressman in the late summer of 1970.¹ The case was assigned to the Honorable John W. Reynolds. After status conferences had been held in April and December of 1973, the plaintiff filed a motion for Judge Reynolds to recuse himself. The plaintiff claimed that, because Judge Reynolds

¹ Margoles had earlier filed a two-count complaint against Johns in the federal district court for the District of Columbia on August 19, 1971, but that complaint was dismissed and Johns's motion to quash service of process was granted. *Margoles v. Johns*, 333 F. Supp. 942 (D.D.C. 1971), *aff'd*, 483 F.2d 1212 (D.C. Cir. 1973).

had been the Wisconsin Attorney General when matters concerning the plaintiff's state medical license were under consideration by the Wisconsin Medical Examining Board, he would be unable to give the plaintiff a fair trial. Prior to a ruling on the plaintiff's recusal motion, the case was transferred to the Honorable Robert W. Warren.

The parties first appeared before Judge Warren at a pre-trial conference on April 25, 1975. Because Judge Warren had served as Attorney General of Wisconsin from 1969 until his appointment to the district bench in 1974, the plaintiff "expressed [his] concern about, and inquired" whether Judge Warren's prior involvement in matters relating to the plaintiff would impair his ability to try the case impartially. Judge Warren replied that any knowledge of, or involvement in, the plaintiff's affairs he may have had was not of such a nature that he needed to disqualify himself.

On October 23, 1975, the defendants moved for dismissal under Fed. R. Civ. P. 37(b)(2)(C) on the ground that the plaintiff failed to comply with discovery orders entered by Judge Warren in January and April 1975. Judge Warren, on January 5, 1976, after hearing arguments on the matter, granted the motion and dismissed the case. Judge Warren stated:

[T]he Court is persuaded that [this] is one of the unusual cases in which the Court should and does make a specific finding that the failure to produce herein is willfull, that it is prejudicial, that the matter sought to be produced is highly relevant and material to the case . . . , and that the failure to produce that and comply with the procedural orders of the Court has been so prejudicial that the sanction called for . . . is appropriate, and that the Court does herewith order that the case shall be dismissed.

Judgment of dismissal was entered on January 8, 1976.

On February 4, 1976, the plaintiff moved to vacate the order of dismissal pursuant to Fed. R. Civ. P. 60(b). That same day, the plaintiff filed notice of appeal from the dis-

missal with this court. On March 15, 1976, Judge Warren denied the plaintiff's Rule 60(b) motion. We considered the plaintiff's direct appeal and the ruling on the Rule 60(b) motion together, and after a careful review of the record, we concluded that Judge Warren's finding that the plaintiff willfully refused to comply with discovery orders was supported by the evidence before him, and affirmed the dismissal. *Margoles v. Johns*, 587 F.2d 885, 888 (7th Cir. 1978) ("*Margoles I*"). Neither before us on direct appeal, nor before the district court on his initial Rule 60(b) motion, did Margoles put into issue Judge Warren's disclaimer of bias or his decision not to disqualify himself.

In July of 1980, the plaintiff filed a motion under Fed. R. Civ. P. 60(b)(4), in which he claimed that Judge Warren's failure to recuse himself violated 28 U.S.C. § 455,² and thus rendered the 1976 order of dismissal void for want of due process. Judge Warren transferred the motion to the Honorable Terence T. Evans, who denied it on February 25, 1981. Judge Evans held that the issue to be resolved was not whether Judge Warren erred in refusing to recuse himself, but rather whether Judge Warren "*in fact* was so biased or prejudiced against [the plaintiff] that the proceeding was unfair." Judge Evans found that "[w]hile it is true that Judge Warren had some knowledge of the [plaintiff], nothing included in the plaintiff's exhibits leads me to conclude that the judge had a duty to dis-

² In *Margoles v. Johns*, 660 F.2d 291, 300 (7th Cir. 1981), we held that, because Margoles had filed this action before the 1974 amendments to 28 U.S.C. § 455 became effective, his claim that § 455 had been violated by Judge Warren's refusal to step aside was to be determined under the pre-1974 version of the statute, which provided:

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

qualify himself from presiding over this slander case," and concluded that "the documentation submitted by . . . [the plaintiff is] far short of the kind of evidence necessary for him even to get a hearing, let alone carry the day." We affirmed on appeal and adopted Judge Evans's Decision and Order. *Margoles v. Johns*, 660 F.2d 291 (7th Cir. 1981) ("*Margoles I*").

On January 5, 1984, the plaintiff filed a third motion under Fed. R. Civ. P. 60(b)(6) to overturn the judgment in which he claimed to have discovered documents that demonstrated Judge Warren and counsel for the defendants failed to disclose "material extraordinary extrajudicial relationships" existing between them during the time Judge Warren was Attorney General of Wisconsin. The plaintiff argued that Judge Warren should have disqualified himself because of this putative relationship, and that his failure to do so denied the plaintiff due process of law.³ Judge Evans denied the plaintiff's motion on January 17, 1985.⁴ This appeal followed.

³ In his motion, the plaintiff requested that Judge Evans recuse himself and assign decision on the Rule 60(b)(6) motion to a federal district judge in another district. Judge Evans denied the plaintiff's request. On January 7, 1985, the plaintiff filed a petition for a Writ of Mandamus with this court, requesting that Judge Evans be ordered to reassign the order. We denied that motion as moot because Judge Evans denied the plaintiff's Rule 60(b)(6) motion. On appeal, the plaintiff challenges Judge Evans's refusal to reassign the Rule 60(b)(6) motion. We find this challenge to be completely without merit, and, therefore, reject it without further discussion.

⁴ In *Margoles II*, 660 F.2d at 293, we observed that:

Although the plaintiff questioned Judge Warren's impartiality at his first appearance before him, that issue was not raised in any . . . post-judgment or appeal proceedings. Although that failure creates substantial questions of waiver and *res judicata*, . . . the district court did not deem it necessary to reach those issues. We agree with the trial judge in that respect.

The district court denied the plaintiff's Rule 60(b)(6) motion on the ground that, "[h]aving raised the disqualification question anew in 1980, [the plaintiff] is surely barred now, on *res judicata*

(Footnote continued on following page)

II

In considering the plaintiff's motion for relief from judgment under Rule 60(b)(6), we do not directly review the district court's dismissal of the plaintiff's action for failure to comply with discovery orders pursuant to Fed. R. Civ. P. 37(b)(2)(C). *Marane, Inc. v. McDonald's Corp.*, 755 F.2d 106, 112 (7th Cir. 1985) ("[W]e cannot reach the merits of the underlying judgment."); see also *Kagan v. Caterpillar Tractor Co.*, No. 85-2365, slip op. at 9-10 (7th Cir. July 7, 1986). As we noted above, we affirmed the propriety of the dismissal order in *Margoles I*. In the instant case, we must determine only whether the district court abused its discretion in denying the plaintiff's motion under Rule 60(b)(6). *Browder v. Director, Department of Corrections*, 434 U.S. 257, 263 n.7, 98 S. Ct. 556, 560 n.7 (1978); *Metlyn Realty Corp. v. Esmark, Inc.*, 763 F.2d 826, 831 (7th Cir. 1985); *Simons v. Gorsuch*, 715 F.2d 1248, 1253 (7th Cir. 1983); *Fuhrman v. Livaditis*, 611 F.2d 203, 204 (7th Cir. 1979). There is, of course, a strong policy favoring the finality of judgments: "[j]udgments in civil cases fix the rights of parties and entitle them to go about their lives [and] may be reopened only for extraordinary reasons." *Metlyn Realty Corp.*, 763 F.2d at 830; see also *Andrews v. Heinhold Commodities, Inc.*, 771 F.2d 184, 188 (7th Cir. 1985); *C.K.S. Engineers, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202, 1205 (7th Cir. 1984); *McKnight v. United States Steel Corp.*, 726 F.2d 333, 335 (7th Cir. 1984); *Merit Insurance Co. v. Leatherby Insurance Co.*, 714 F.2d 673, 682-83 (7th Cir. 1983). Indeed, we have held that, to find an abuse of discretion under Rule 60(b), the appellate court must be convinced that "no

⁴ continued

grounds, from raising it again." The court also noted that, "[n]othing presented in support of the motion, no matter how it is characterized, shows actual unfairness or partiality on the part of Judge Warren." Because we have determined that the plaintiff's motion was without merit, we express no opinion on the *res judicata* question.

reasonable man could agree with the district court's decision." *Tolliver v. Northrop Corp.*, 786 F.2d 316, 318 (7th Cir. 1986); *Simons*, 715 F.2d at 1253; *Smith v. Widman Trucking & Excavating*, 627 F.2d 792, 795-96 (7th Cir. 1983).

Rule 60(b) allows a district court to relieve a party from a final judgment for the reasons specified in subsections (1) through (5).⁵ In addition, subsection (6) provides that the court may grant a motion under Rule 60(b) for "any other reason justifying relief."⁶ Nevertheless, relief under

⁵ Fed. R. Civ. P. 60(b) provides in relevant part:

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

⁶ Relief under Rule 60(b)(6) is appropriate only if the grounds asserted for relief do not fit under any of the other subsections of Rule 60(b). *Klapprott*, 335 U.S. at 613, 69 S. Ct. at 389-90; *Industrial Associates, Inc.*, 787 F.2d at 269; *Bershad v. McDonough*, 469 F.2d 1333 (7th Cir. 1972). Otherwise, a movant could use subsection (6) to circumvent the rather demanding time limitations placed on a motion under subsections (1) through (3).

There is no such time limitations placed on subsection (4) motions for setting aside a judgment as void. As we held in *Alskar v. Honeywell, Inc.*, 95 F.R.D. 419 (7th Cir. 1982), "the reasonable time criterion of Rule 60(b) as it relates to void judgments, means no time limit, because a void judgment is no judgment at all." Hence, "the court that entered a void judgment may vacate it

(Footnote continued on following page)

60(b)(6) is warranted only upon a showing of extraordinary circumstances that create a substantial danger that the underlying judgment was unjust. *Ackerman v. United States*, 340 U.S. 193, 71 S. Ct. 209 (1950); *Klapprott v. United States*, 335 U.S. 601, 69 S. Ct. 384 (1949); *Kagan*, slip op. at 15. *Industrial Associates, Inc. v. Goff Corp.*, 787 F.2d 268, 269 (7th Cir. 1986); *Merit Insurance Co.*, 714 F.2d at 682-83.

The plaintiff claims that the documents attached to his Rule 60(b)(6) motion demonstrated (1) that an Assistant Wisconsin Attorney General, during the time Judge Warren served as the Wisconsin Attorney General, communicated with counsel for the defendants in the original slander suit and exchanged information with them concerning that suit, and (2) that the office of the Attorney General had used a reporter for the defendant newspaper to investigate the plaintiff in regard to his efforts to regain his medical licence. The plaintiff argues that the existence of these "relationships" denied him due process, and constituted extraordinary circumstances making relief under Rule 60(b)(6) appropriate. We disagree.

We have thoroughly examined the documents underlying the plaintiff's motion. Some of those documents relate to events that occurred *before* Judge Warren was elected At-

* *continued*

at any time." *Rodd v. Region Construction Co.*, 783 F.2d 89, 91 (7th Cir. 1986). In addition, although the elapse of a specific period of time between the entry of judgment and the ruling on the motion for relief is not determinative of a motion under subsection (6), *Sudeikis v. Chicago Transit Authority*, 774 F.2d 766, 769 (7th Cir. 1985) ("There is no hard and fast rule as to how much time is reasonable for the filing of a Rule 60(b)(6) motion."), because of the high value the framers of Rule 60(b) set on the societal interest in the finality of litigation, the motion must be brought within a reasonable time. One must consider the facts of each case, the reason for delay, the practical ability of the litigant to learn earlier of the grounds relied upon, and the prejudice to other parties if the judgment is revisited, in determining whether the time elapsed was reasonable. *Kagan v. Caterpillar Tractor Co.*, No. 85-2365, slip op. at 16 (7th Cir. July 7, 1986).

torney General of Wisconsin, and hence, before he could be said to have any involvement in either the slander lawsuit or the plaintiff's other lawsuits. Some documents were part of the records in other litigation the plaintiff has pursued. These included depositions, motions, and court orders. Most of the remaining documents chronicle the plaintiff's dispute in 1983 with the office of Wisconsin Attorney General over the production of investigative files and the like, for use in the instant Rule 60(b)(6) proceedings, or for use in the plaintiff's other litigation. We have concluded that these documents neither compromise Judge Warren's decision not to disqualify himself, nor impugn the justness of the proceedings leading to the dismissal order.

Those few documents that bear on the alleged relationship between Judge Warren, during the period when he was Attorney General, and counsel for the defendants are either totally inconclusive of the nature of that "relationship," if such it be, or patently innocuous. On the basis of the record before us, we conclude that the "exchange of information," which constitutes the gravamen of the plaintiff's Rule 60(b)(6) motion, involved essentially the exchange of court documents that were part of the record, including depositions of the plaintiff and other parties, in a lawsuit which the plaintiff had brought and in which the office of the Wisconsin Attorney General was defending.⁷

⁷ Exhibit B-4 included, among the items sent by the Wisconsin Attorney's General office to counsel for the defendants in the slander suit, an item entitled "Copies of written communications with State of Illinois." The plaintiff does not suggest, nor can we perceive on the basis of the record before us, what significance these "communications" might have on the question of the nature of the putative relationship between defense counsel and Judge Warren's office, during the period of time he was Attorney General. Nor is there any indication that these documents bear on material disputed facts in the slander case. The other documents listed in Exhibit B-4 were either depositions or copies of the complaint, summons, etc., in another lawsuit the plaintiff had brought.

As to the plaintiff's claim that Judge Warren's former office made use of one of the defendant newspaper's employees to investigate him, it is true that the Wisconsin Attorney's General office did call upon a person to investigate Margoles in regard to a matter unrelated to any material issues in the slander suit.⁸ That "relationship" developed several years before Judge Warren was elected Attorney General, and did not involve his administration of that office. In addition, this occurred when the investigator was not an employee of the defendants. There is also some indication that this person was called upon to provide information to the Attorney General subsequent to Judge Warren's election to that office and after the person became a reporter for the defendants. Nevertheless, the documents of record shed absolutely no light on whether the information requested or provided was relevant to any material factual issues that might have been disputed in the instant action.⁹ Therefore, the existence of this "relationship," if such it be, does not present the "extraordinary circumstances" necessary to warrant relief under Rule 60(b)(6).

Even assuming that Judge Warren knew of these activities and the communications between his office and coun-

⁸ The statements forming the basis of the plaintiff's slander suit were allegedly made in August and September of 1970. The alleged events to which the plaintiff points to occurred well before that.

⁹ The plaintiff makes unsupported allegations that the Wisconsin Attorney's General office improperly withheld documents that might have enabled him to substantiate his claim that this relationship continued into the time Judge Warren was Attorney General and biased Judge Warren against the plaintiff. The plaintiff raised these allegations before the district court. That court, therefore, had these allegations before it in passing on the plaintiff's Rule 60(b)(6) motion, and obviously found them inconsequential. We cannot say that the court erred in so doing. We note also that the Wisconsin Open Records Act, Wis. Stat. 19.21-19.37, provides a basis for the plaintiff to attempt to gain access to these records. We note that the plaintiff requested these documents pursuant to the Act, but the record does not disclose whether the plaintiff has exhausted the channels of relief provided him by that Act.

sel for the defendants in the underlying slander case, the evidence and reasonable inferences drawn from it are woefully inadequate to warrant relief under Rule 60(b)(6). The plaintiff's claim that these documents establish that Judge Warren stood in an "of counsel" relationship to defense counsel is groundless. Likewise, the claim that Judge Warren had a "substantial interest" in the case is totally unfounded.¹⁰ The plaintiff clearly has failed to demonstrate extraordinary circumstances that create a substantial danger of an unjust result.¹¹ *Merit Insurance Co.*, 714

¹⁰ The terms "of counsel" and "substantial interest" appeared in 28 U.S.C. § 455 prior to its amendment in 1974. We held in *Margoles II*, 660 F.2d at 300, that the unamended § 455 was applicable to the issue whether Judge Warren improperly failed to disqualify himself. By our use of those terms now, we do not mean to suggest that the relevant question before us is the propriety under § 455 of Judge Warren's decision not to recuse himself. The only question we must consider to dispose of the plaintiff's appeal from the denial of his Rule 60(b)(6) motion is whether the evidence he adduced created a substantial danger of an unjust result. Insofar as the plaintiff argues that Judge Warren had a substantial interest in the outcome of the slander suit or that he acted of counsel to the defense attorneys in that suit, we consider whether the plaintiff's proof of such a relationship (and we do not mean to suggest that the plaintiff has made such a showing) created a substantial danger of an unjust result, not whether Judge Warren should in fact have recused himself. As we noted above, we find that the plaintiff's evidence is inadequate to meet the requirements of Rule 60(b)(6).

¹¹ The plaintiff argues that he need not demonstrate that Judge Warren was actually biased or partial in order to prevail on his Rule 60(b)(6) motion. The plaintiff maintains that the proper threshold of proof would be that of an appearance of partiality. We disagree. As we recently noted in *United States v. Balistreri*, 779 F.2d 1191, 1204-5 (7th Cir. 1985), *cert. denied*, ___ U.S. ___, 106 S. Ct. 3284 (1986), the improper failure of a judge to recuse himself due to an appearance of partiality constitutes an "injury to the judicial system as a whole and not to the substantive rights of the parties," and hence, cannot rise to the level of reversible error. See also *United States v. Murphy*, 768 F.2d 1518 (7th Cir. 1985). The plaintiff's argument that *Balistreri* applies only to § 455 in its amended form, even if we were to find it persuasive (which

(Footnote continued on following page)

F.2d at 682-83. We hold, therefore, that the district court did not abuse its discretion in denying the plaintiff's Rule 60(b)(6) motion.

III

The defendants-appellees have requested that we assess fees and costs against the plaintiff pursuant to Fed. R. App. P. 38. Although we do not ordinarily grant such requests, we have determined that this appeal was frivolous, and, therefore, assess the plaintiff-appellant \$2,500.00 in fees, costs, and damages. For the reasons stated above, the district court's order dismissing the plaintiff's motion under Fed. R. Civ. P. 60(b)(6) is

AFFIRMED.

A true Copy:

Teste:

*Clerk of the United States Court of
Appeals for the Seventh Circuit*

¹¹ *continued*

we do not), is inconsequential. If the appearance of bias cannot rise to reversible error in the context of an appeal from a judge's failure to disqualify himself, it follows *ipso facto* that it cannot be sufficient to create a substantial danger of an unjust result. Therefore, to prevail on his Rule 60(b)(6) motion, the plaintiff must demonstrate actual bias, not an appearance thereof.

JUDGMENT - ORAL ARGUMENT
UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

August 20, 1986

Before

Hon. Richard D. Cudahy, Circuit Judge
Hon. Jesse E. Eschbach, Circuit Judge
Hon. Richard A. Posner, Circuit Judge

DR. MILTON MARGOLES,	) Appeal from the
Plaintiff-Appellant,	) United States
	) District Court
No. 85-1267 vs.	) for the Eastern
	) District of
ALIDA JOHNS and THE JOURNAL	) Wisconsin.
COMPANY, a Corporation,	) No. 72 C 470
Defendants-Appellees.	) Judge Terence T.
	) Evans

This cause was heard on the record from the United States District Court for the Eastern District of Wisconsin, _____ Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 17, 1986

Before

Hon. Richard D. Cudahy, Circuit Judge
Hon. Richard A. Posner, Circuit Judge
Hon. Jesse E. Eschbach, Senior Circuit Judge

DR. MILTON MARGOLES,	)	Appeal from the
Plaintiff-Appellant,	)	United States
	)	District Court
No. 85-1267 vs.	)	for the Eastern
	)	District of
ALIDA JOHNS and THE JOURNAL	)	Wisconsin.
COMPANY, a Corporation,	)	No. 72 C 470
Defendants-Appellees.	)	Terence T.
	)	Evans, <u>Judge</u> .

O R D E R

On consideration of the petition for rehearing with suggestion for rehearing en banc filed in the above-entitled cause by plaintiff-appellant, Margoles, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

DR. MILTON MARGOLES,

Plaintiff,

v.

Civil Action

ALIDA JOHNS and the JOURNAL
COMPANY, a corporation,

No. 72-C-470

Defendants.

DECISION and ORDER

"'Tis known by the name perseverance
in a good cause, and obstinacy in a
bad one."

- Laurence Sterne (1713-1768)

The tortured history of this case, which began in 1972, is detailed in Margoles v. Johns, 660 F.2d 291 (7th Cir. 1981). It need not be repeated here. Like a Turle Wax shine, however, this case will not fade away. It is here again on a renewed Rule 60 (b) motion which seeks essentially the same relief sought in a Rule 60(b) motion filed in 1980. The denial of the 1980 Rule 60(b) motion (the second such motion that was filed here; the

first was filed in 1975 and its denial was affirmed in Margoles v. Johns, 587 F.2d 885 (7th Cir. 1978)) was affirmed in the decision reported at 660 F.2d 291. Margoles' petition for a writ of certiorari was denied. 455 U.S. 909 (1982).

On January 5, 1984, Margoles filed his present motion, which was assigned to me by Chief Judge John W. Reynolds. Because the present motion raises, to use Margoles' words, "sensitive and substantial issues of judicial/attorney misconduct" involving Judge Robert W. Warren of this district and James P. Brody of the Milwaukee law firm of Foley & Lardner, he asks that I recuse myself and take steps to have this matter transferred to a judge from outside the Seventh Judicial Circuit. Because this motion must so obviously be denied, I believe the case need not be reassigned and, accordingly, I decline to recuse myself.

Margoles' new motion is based, at least in

part, on what he says is "new evidence" uncovered in 1983 under the Wisconsin open records law. Reduced to its essence, the "new evidence" is said to support two claims:

(1) that the office of the Attorney General of Wisconsin exchanged some information with the firm of Foley & Lardner, particularly Attorney Brody, and that this made Robert Warren, as the Attorney General of Wisconsin, "co-counsel" with Foley & Lardner and gave Warren extra-judicial knowledge or information about this case; and

(2) that Warren, while holding the position of Attorney General, utilized the Milwaukee Journal Company to investigate Dr. Margoles.

Margoles makes sweeping and repeated accusations of "extraordinary extra-judicial relationships," of a "symbiotic relationship" between defendants' attorneys (Foley & Lardner and Mr. Brody) and an assistant Attorney General, and of "breaches of ethics manifesting rank bad faith." The basis for these allegations is found in:

(1) evidence that Sverre Tinglum, an Assistant Attorney General, sent Attorney Brody some court papers in a Western District case involving Margoles, and that the two had an exchange of three letters in February-March, 1974;

(2) evidence that another Assistant Attorney General, John Armstrong, said that Tinglum had maintained communications with Journal Company attorneys and that another Assistant Attorney General, Charles Larsen, acknowledged some communications; and

(3) evidence that Assistant Attorney General LeRoy Dalton had two telephone conversations with a James Wieghart, a former Milwaukee Sentinel reporter, in September, 1965.

Incredible as it is, considering the mountain of paper and the serious accusations hurled indiscriminately at Judge Warren and James Brody, that is all his entire motion rests on. His showing is insufficient, and it is also precluded as a matter of law.

The issue of Judge Warren's disqualification was resolved in the original proceedings when he declined to recuse himself on plaintiff's inquiry and the plaintiff failed to raise the matter on appeal. Waiver and res judicata precluded the raising of the issue again but, because of its personal nature, I decided to reach the merits of the issue in my decision denying the 1980 motion. In affirming my decision on the merits, however, the Court

of Appeals noted that plaintiff's failure previously to have raised the question of Judge Warren's partiality when he had opportunities to do so "creates substantial questions of waiver and res judicata." Margoles v. Johns, 660 F.2d 291, 293 (7th Cir. 1981). Having raised the disqualification question anew in 1980, Margoles is surely barred now, on res judicata grounds, from raising it again. There must be finality somewhere in the system, and that point has now been passed.

I believe that one final comment here should be made. Nothing presented in support of the motion, no matter how it is characterized, shows actual unfairness or partiality on the part of Judge Warren. In retrospect, however, it may have been more prudent for him to have passed this chestnut to another judge only because it would have been the less troublesome thing to do. The office that Warren headed did defend the State on matters involving Dr. Margoles (a fact, of

course, that was known by all) and, as good lawyers do, the State lawyer actually handling the case conferred with a private lawyer (Brody) representing private defendants in an unrelated matter (this case) being pursued by the doctor. Even though, and this seems clear, Warren had no actual knowledge of what was going on, problems could have been avoided by passing the case. Now, however, we are past the point where "appearances" matter and are concerned only with actual prejudice. Quite simply, there is none here. The third Rule 60(b) motion is DENIED.

SO ORDERED at Milwaukee, Wisconsin, this 17 day of January, 1985.

BY THE COURT:

/s/

TERENCE T. EVANS
UNITED STATES DISTRICT JUDGE

CONSTITUTIONAL AND STATUTORY PROVISIONS

FIRST AMENDMENT TO THE CONSTITUTION
OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or of the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

THE DUE PROCESS CLAUSE OF
THE FOURTEENTH AMENDMENT
TO THE CONSTITUTION OF THE UNITED STATES

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny

to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 144

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding. The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. *A party may file only one such affidavit in any case.* It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

(emphasis added)

28 U.S.C. § 455
(prior to 1974 amendment)

Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein.

FED.R.CIV.P. 60 (B):
RELIEF FROM JUDGMENT OR ORDER

(b) MISTAKES; INADVERTENCE; EXCUSABLE
NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD; ETC.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b);

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28 U.S.C. § 1655,

or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.